2166/06 10/5/06 Rajesh Roy 10/5/06 (4) (2)

Filed on 10/5/06 by Shri

Division Bench

IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT

BILASPUR

Cr.A. NO. 373 /2006

APPELLANT (In Jail) : Nirmal Das Mahant, S/o Late Salik Das Mahant, R/o Village Sisringa, Chunwabahari, P.S. Dharamjaygarh, Distt. Raigarh (C.G.)

VERSUS

RESPONDENT : State of C.G., Through P.S. Dharamjaygarh Distt. Raigarh

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CRIMINAL PROCEDURE CODE 1973.

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मामला क्रमांक Cr.A.373..... **सन् 2006**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH:

HON'BLE MR. L.C.BHADOO
HON'BLE MR. DHIRENDRA MISHRA, JJ

CRIMINAL APPEAL NO. 373/2006

Appellant : **Nirmal Das Mahant**

Versus

Respondent : **State of Chhattisgarh.**

Mr. J.D. Bajpai learned counsel with Mr. Rajesh Ranjan Sinha for the appellant.
Mr.U.N.S. Deo Additional Public Prosecutor for the State.

ORAL JUDGMENT
(20.12.2006)

Per L.C. Bhadoo, J

Today the matter is fixed for arguments on M.Cr.P. No. 2601/2006 for suspension of sentence and grant of bail. However, counsel for the appellant submits that the accused is in detention for more than one year and five months and his earlier application for bail was rejected for non prosecution, therefore, the appeal itself may be heard finally to which

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

learned counsel for the respondent/State has no objection. Thus the appeal is heard finally.

The appellant has preferred this Criminal Appeal under section 374(2) of the Code of Criminal Procedure against the judgment of conviction and order of sentence dated 29.4.2006 passed by Additional Sessions Judge, (FTC) Raigarh in Sessions Trial No. 102/2005 whereby he has been held guilty under Section 302 of the Indian Penal Code for committing the murder of one Jaipal Das, and sentenced to undergo imprisonment for life.

2. Case of the prosecution in brief is that PW-1 Kailash Das lodged the First Information Report Ex. P-1 in police station Dharamjaygarh on 3.7.2005 to the effect that a day earlier there to, his brother Jaipal left the house saying that he was going to *Basti* for getting the hair cut but he did not return in the night. However, on 3.7.2005 in the morning at about 6/6-30 a.m. when he was at his residence, one Dharam Kujur of his village came to his house and informed that his brother Jaipal is lying in front of a Damar Plant in an unconscious condition. On receiving this information he along with Sudhir Kujur, Vikram Mahant, Bhagwandas all residents of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Sisranga went to the place where his brother Jaipal was lying on the ground in an unconscious condition. From there they brought him to the house and they tried to have a talk with Jaipal but he was not in a position to talk and sometime thereafter he died. Nirmal Das of his village was doubting that Jaipal was having illicit relationship with his brother's wife, therefore, for last 4-5 years animosity between Jaipal and Nirmal Das was going on and on the previous day i.e. 2.7.2005 both of them were seen together while they were going to consume beer, he suspects the involvement of Nirmal Das in committing the murder of his brother Jaipal. Receiving this report Station House Officer of Police Station Dharamjaygarh registered the crime under section 302 of the IPC, left for the scene of occurrence, after giving notice Ex. P-3 to the Panchas he conducted inquest on the body of Jaipal and prepared inquest report. Thereafter, body was sent to Government Hospital, Dharamjaygarh for post mortem examination under Ex. P-15-A where Dr. A.S. Thakur PW-11 conducted the post mortem examination and prepared the post mortem report Ex. P-15 in which he opined that cause of death was asphyxia. He also noticed abrasion on left wrist, abrasion on the dorsal of palm, abrasion on knees and multiple abrasions on the neck. While in police

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	custody accused gave memorandum Ex. P-4 that the Lungi of Jaipal has been kept beneath Tendu plant and in pursuance of that memorandum he got recovered the same under Ex. P-5. Plain soil and one belt were taken into possession from the place of occurrence under Ex. P-7. Site plan Ex. P-13 was prepared. After completion of usual investigation charge sheet was filed in the Court of Judicial Magistrate First Class, Dharamjaygarh who in turn committed the case to the Court of Sessions Judge, Raigarh, from where learned Additional Sessions Judge, Raigarh received the same on transfer for trial. 3. Prosecution in order to establish the charge against the accused examined as many as 16 witnesses. Statement of the accused was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the material appearing against him in the prosecution case and pleaded his innocence and false implication in the case. One defence witness Rukni Bai DW-1 was also examined by the accused. 4. Learned Additional Sessions Judge after hearing counsel for the respective parties convicted and sentenced the accused as mentioned above.	

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

5. We have heard Shri J.D. Bajpai and Shri Rajesh Ranjan Sinha for the accused/appellant and Shri U.N.S. Deo Additional Public Prosecutor for the respondent/State.

6. Counsel appearing for the appellant has not disputed the homicidal nature of death of Jaipal. That apart, from the evidence of Dr. A.S. Thakur PW-11 who has stated in his evidence that he conducted the post mortem examination on the body of Jaipal and noticed three injuries on the neck and on opening the neck it was noticed that there was fracture on the hide bone and cause of death was asphyxia and the death was homicidal in nature, it is established that death of Jaipal was homicidal in nature.

7. As far as involvement of the accused in crime in question is concerned, there is no direct and ocular evidence in the case and case of the prosecution rests on the circumstantial evidence such as (i) deceased was seen alive with the accused in the evening of 2.7.2005 i.e. before the deceased was found in an unconscious condition in front of the Damar plant; (ii) belt of the accused was found near the place of occurrence.

8. As per settled law in order to rest conviction based on the circumstantial evidence, as per the decision of Apex Court in the matter of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Dhananjoy Chatterjee Vs. State of W.B. reported in **(1994) 2 SCC 220**, the circumstantial evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

9. Now, we shall proceed to examine the evidence adduced by the prosecution in order to connect the accused with the crime in question based on the circumstantial evidence. As far as the first circumstance is concerned, PW-6 Ratan and PW-14 Narsing have been examined by the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

prosecution. PW-6 Ratan has been declared hostile. PW-14 Narsing has stated in his evidence that in the evening when there was a little darkness, he saw Jaipal with the accused, both of them were going on a road and in the next day morning he came to know that Jaipal has been murdered. In the cross examination this witness has stated that he did not see the deceased with the accused at 10-11 p.m. or at 1-1.30 a.m. and such type of statement was not given by him to the police. The above evidence of this witness cannot be relied upon for the reason that in the Court evidence he has stated that he saw the accused and the deceased going on the road in the evening whereas in the police diary statement Ex. P-6 he has stated that he saw them in the night at about 10-11 p.m. or 1-1.30 a.m., therefore, there is material contradiction between the court evidence and the police diary statement. Moreover, in the Court evidence this witness has stated that both of them were going together. On the public road number of persons always move but that does not mean that they were going together and they were talking. Moreover, this last seen evidence is a weak type of evidence to connect the accused with the crime as it has been held by the Supreme Court in the matter of **Bodhraj alias Bodha and others Vs. State of Jammu and Kashmir reported in**

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	(2002) 8 SCC 45, that theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together. Again in the matter of **Subhash Chand Vs. State of Rajsthan** reported in **(2002) 1 SCC 702** it has been held by the Supreme Court that to constitute the evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of the commission of crime. In the matter of **State of Karnataka Vs. M.V. Mahesh** reported in **(2003) 3 SCC 353** Hon'ble the Apex Court has held that merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together.	

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

10. Except the evidence of Narsing PW-14 that accused and the deceased were going on a road, there is no other evidence available on record to show that the accused was the author of the crime in question. Moreover, as per the evidence they were seen in the evening going on a road whereas the body of Jaipal was seen next day morning at 6-6.30 p.m. by one Dharam Kujur in front of the Damar Plant and apart from this there is not even an iota of evidence to connect the accused with the crime in question.

11. As far as the recovery of belt of the accused from the place of occurrence is concerned, there is no evidence to show that the said belt was belonging to the accused or that somebody saw the accused wearing that belt. PW-1 Kailash Das has tried to establish that the deceased saw the accused with his brother's wife, therefore, relation of accused and deceased were strained for last 4-5 years whereas wife of the brother of the accused who has been examined as DW-1 has categorically stated that the accused never locked her in the room, and there is no other evidence to corroborate the evidence of Kailash Das that the accused was having any relation with the wife of his brother.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	12. PW-1 Kailash Das in his Court evidence has stated that when he reached near the body of Jaipal, he informed that Nirmal had attacked him whereas the report of Ex. P-1 was lodged by this witness in which he himself has mentioned that when he reached near the body of Jaipal, he was lying in an unconscious condition, therefore, he took him to his house from that place. Had the deceased stated to this witness that Nirmal was responsible for causing the injury on the neck and other parts of his body, then nothing prevented this witness to mention this fact in the FIR, therefore, this witness Kailash Das has improved his version in the court evidence which cannot be relied upon. 13. For the foregoing reasons, we are of the considered opinion that the prosecution has utterly failed to connect the accused/appellant with the crime in question based on circumstantial evidence, therefore, findings of the trial Court convicting the accused under section 302 of the IPC and sentencing him to undergo imprisonment for life cannot be sustained. 14. In the result, the appeal is allowed. Impugned judgment of the trial Court is set aside and the appellant is acquitted of the charge leveled	

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	against him. He is directed to be set at liberty forthwith if not required in any other case. **Sd/-** **L.C.BHADOO** **Judge**	**Sd/-** **Dhirendra Mishra** **Judge**

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